CJC Holdings, Inc. *and* United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751. Case 16–CA–16778–2

March 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 29, 1995, Administrative Law Judge Frederick C. Herzog issued the attached ruling on motion for reconsideration and amended decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CJC Holdings, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We find without merit the Respondent's allegations of bias on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by announcing its intention to implement its last offer relating to dental insurance, we note that the promise itself, even if not immediately carried out, changed the terms and conditions of employment. *ABC Automotive Products Corp.*, 307 NLRB 248 (1992).

In agreeing with the judge's conclusion that the Respondent violated the Act by refusing to bargain in good faith on the subject of dues checkoff, Member Cohen does not rely on the judge's finding that a company's fundamental opposition to dues checkoff, on policy grounds, is not a legitimate reason for opposing such a contract provision. Rather, he relies on the judge's finding that the Respondent's primary goal was to avoid agreement and reach impasse.

Elizabeth Kilpatrick, Esq., for the General Counsel.
Steven Rahhal, Esq. (McFall Law Firm), of Dallas, Texas, for the Respondent.
Davis Van Os, Esq. (Van Os & Vasquez), of Austin, Texas, for the Charging Party.

RULING ON MOTION FOR RECONSIDERATION AND AMENDED DECISON

FREDERICK C. HERZOG, Administrative Law Judge. This case was decided by me on August 17, 1995. On August 24, 1995, counsel for the General Counsel filed a motion for reconsideration. Essentially, the basis for the motion is counsel for the General Counsel's assertion that I erred in my decision by giving an overly broad interpretation to her prior partial withdrawal of complaint, regarding the subject matter of Respondent violating Section 8(a)(5) and (1) of the Act by insisting on discontinuing a provision for checkoff. Her contention is that, as a result of an erroneous interpretation by me of her partial withdrawal of complaint, I was led to the further error of failing to fully decide the allegations of paragraphs 10 and 11 of the complaint.

On August 25, 1995, Respondent filed its response in opposition to counsel for the General Counsel's motion for reconsideration. Essentially, Respondent's opposition is based on its contention that the General Counsel should not be given the unfair advantage of a ''second bite at the apple.''

Having considered the matter, I have concluded that counsel for the General Counsel's motion has merit, and that, for the reasons stated in her motion, I should have decided more in my decision than I did.

The error made by me is, on reflection, apparent. It is of the sort which would clearly cause the Board to someday remand the case to me for further consideration. Thus, I regard it as being within my discretion to correct at this early date following my original decision. I do so on the original record and based on the arguments advanced by the parties briefs.

Accordingly, IT IS ORDERED that counsel for the General Counsel's motion for reconsideration should be granted, and my decision is amended by the issuance nunc pro tunc of the following amended decision.

AMENDED DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. I heard this case in Austin, Texas, on April 6 and 7, 1995. It is based on a complaint[1] issued by the Regional Director for Region 16 of the National Labor Relations Board on November 18, 1994. United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751 (the Union) filed the charge in Case 16–CA–16778–2 on July 7, 1994, alleging that CJC Holdings, Inc. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

All parties appeared at the hearing, and were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

[1] At trial counsel for the General Counsel withdrew from the complaint par. 12(C), which had previously alleged Respondent's implementation of a provision allowing Respondent to give wage increases to individual members of the unit.

Following the trial, counsel for the General Counsel withdrew from the complaint pars. 12(A) and 12(E), which were previously allegations that Respondent implemented its management-rights clause and its zipper clause, and deleted the collective-bargaining agreement's previous provision for dues checkoff.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that Respondent is a Texas corporation with an office and place of business in Austin, Texas; that at all times material it has manufactured school rings and other jewelry at its facility located there; and that it annually purchases goods and materials valued in excess of $50,000 directly from suppliers located in States other than Texas.

Accordingly, I further find that Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

As noted above, the allegation regarding unilateral implementation of the management rights and the ''zipper'' clauses, and the allegation regarding the deletion of the dues-checkoff provision have each been withdrawn from the complaint following the trial. Accordingly neither of these allegations can be addressed further, since they are no longer before me for decision.

Thus, after giving effect to the specific wording of the withdrawals of various allegations from the complaint, the remaining issues are:

> First, whether or not on or about July 4th, 1994, Respondent unlawfully unilaterally implemented a 40-cent-per-hour wage increase.
>
> Second, whether Respondent also then unlawfully unilaterally implemented a provision extending dental insurance coverage to bargaining unit employees.
>
> Third, whether or not Respondent failed to bargain in good faith with the Union, as evidenced by such matters as the insistence upon discontinuing the dues-checkoff provision of the prior contract.

B. *Background*

Respondent is a jewelry manufacturer, with a factory located in Austin, Texas. It employs about 160 production and maintenance employees at that location. Respondent and its predecessors have had a collective-bargaining agreement with the Union since 1973, when the Union was first certified as the exclusive collective-bargaining representative. Its most recent collective-bargaining contract was a 5-year agreement which began on June 7, 1989, and ended on June 6, 1994.[2]

During the term of this agreement Respondent engaged in activities later held to constitute unfair labor practices, i.e., in March 1992, Respondent refused to provide the Union with information relevant to collective bargaining, and later, it refused to bargain in good faith with the Union pursuant to the contract's midterm wage reopener provision. On September 22, 1993, Administrative Law Judge James M. Kennedy determined that Respondent's conduct violated Section 8(a)(1) and (5) of the Act. The Board affirmed Judge Kennedy's ruling on December 16, 1994. *CJC Holdings* 315 NLRB 813 (1994). Thus, in the first half of 1994, in addition to upcoming negotiations for a new collective-bargaining agreement, Respondent was ordered to bargain in good faith pursuant to the midterm wage reopener set forth in the collective-bargaining agreement.

C. *The Facts of the Current Case*

In a letter dated March 3, 1994, Union Representative Ray White notified Respondent's personnel manager, Suzie Adams, that the Union wished to begin negotiations for a new contract. Adams responded by letter dated March 10, 1994, stating that Respondent was willing to negotiate items ''including but not limited to those covering the period from June 7, 1992.'' The Union then did not contact Respondent until late April. Negotiations did not begin until May 13.

The parties met and negotiated on eight occasions between May 13 and June 21, 1994. However, they did not reach a complete agreement. On July 4, 1994, Respondent implemented the terms of its ''final proposal'' to the Union.

Since then, counsel for the General Counsel has asserted that Respondent unlawfully implemented its final proposal in the absence of a lawful bargaining impasse. Respondent contends that the parties were at impasse and, therefore, that Respondent was lawfully free to, and did, implement the terms of its final proposal.

Prior to the final meeting on June 21, the parties were able to bargain and reach agreement on several issues, including a new attendance policy, layoff and seniority rights, and overtime procedures. All contractual issues were resolved except:

> (1) the management-rights clause.
> (2) the complete agreement or ''zipper clause.''
> (3) wages.
> (4) dues checkoff.
> (5) dental insurance.

At the initial May 13 meeting, the Union proposed a 50-cent-per-hour increase for each of the 3 years of the contract. Respondent made its first counteroffer at the third meeting, held June 2, offering in the first year a 30-cent-per-hour increase and in the second and third year of the contract a 10-cent-per-hour increase in both. As the parties referred to it, the offer was ''30/10/10.''[3] The Union's initial proposal did

[2] As the complaint alleges, and as the answer admits, I find that the unit appropriate for collective bargaining here is described as follows:

> All production and maintenance employees employed by CJC Holdings, Inc. at its Austin, Texas facility, formerly operated by Artcarved Class Rings as successor to John Roberts, Incorporated, excluding all other employees including office and factory clerical employees, inventory purchasing clerks, security guards, nurses, professional and technical employees, employees involved in new product design and development and supervisors as defined in the Labor Management Relations Act of 1947, as amended, as certified by the National Labor Relations Board in Case No. 23–RC–3979 on August 13, 1973.

[3] Each number, set off by a slash, represents the amount by which wages were to increase, expressed in cents per hour, over each of

not include a dental plan for employees, although dental insurance was listed as a topic for bargaining.

At the fourth meeting, held on June 6, the Union responded to Respondent's wage offer by lowering its demand to 50/45/45. Respondent initially offered 30/15/15, and then 30/20/15. The Union then countered with an offer of 50/45/40. Also at this meeting, the Union made its first proposal concerning a dental plan, asking to be included in Respondent's dental insurance program for office employees. Respondent stated that it would be difficult to discuss dental insurance problems when there was no agreement on wages.

Further progress was made at the next meeting, on June 8th, with the Union lowering its wage demand to 50/40/40, and requesting the inclusion of bargaining unit employees in the dental program. Respondent countered with an offer of 35/25/20 and stated that it would consider employee inclusion in the dental plan.

The parties were scheduled to meet next on June 10.

But, the meeting was canceled due to an emergency involving Respondent's attorney and chief negotiator, John McFall.

The parties next met on June 17. Respondent demanded that any cost for dental insurance be included within the hourly wage increase as part of an overall economic program. The Union requested that Respondent provide a cents-per-hour figure reflecting the cost of providing dental insurance. Respondent told the Union that it would not agree to the Union's latest offer of 50/40/40, plus dental insurance, and that any dental coverage had to be mandatory.

Prior to the final meeting on June 21, Respondent advised the Union that it would cost Respondent approximately $.085 per hour per employee for dental coverage.

At the June 21 meeting, the Union then revised its wage increase demand to 50/35/35. However, this request also included dental coverage on an optional basis, and a request that rates remain the same throughout the contract period. Respondent told the Union that this proposal amounted to an increase in its previous economic demands, because when the $.085-per-hour dental estimate was factored into the wage figure, the Union's proposal increased to $.585 per hour in the first year and a $.435 per hour increase in the second and third years. Furthermore, Respondent contends that it had made it clear that any dental insurance program had to be mandatory. Despite this demand, the Union maintained its demands for optional dental coverage.

Respondent claims that it was due to these perceived increases in the Union's demands that it then proposed its ''best and final offer,'' which it was prepared to unilaterally implement.

This included a wage increase of 40/25/25, and a willingness to include the bargaining unit employees in Respondent's dental program during the second year, assuming that costs did not increase. David Van Os, attorney and chief negotiator for the Union, told McFall that he was extremely disappointed with the offer and that ''it is not a surprise that it is [Respondent's] intention to express great disrespect to the Union,'' and that the ''offer [was] inadequate to rectify bad faith bargaining during the [1992] wage reopener.'' Van Os then requested a written copy of the final offer, telling McFall that ''we would like to know exactly what you are arrogantly pushing down our throats, if we are getting screwed we want to know what we are getting screwed with.'' McFall refused to provide a written copy, and the talks broke off.

After the June 21 negotiations broke down, Respondent posted the following ''Announcement'' at the plant.

> We met with the Union today and no agreement was reached. We believe we are at an impasse in negotiations because the Company and the Union cannot agree on the dues collection process.
>
> We believe it is unfair for employees to go without a pay increase since the contract expired on June 6th.
>
> We have told the Union that the Company's final offer for a new contract is 40 cents this year, 25 cents the next year and 25 cents the third year. In addition, next year we intend to add dental coverage. Effective July 4 everyone in the factory will have their pay increased 40 cents per hour. Also merit increases will be continued where deserved.

No further negotiation sessions were held following the June 21 meeting, and neither party has attempted to contact the other party to reopen negotiations.

With respect to ''dues checkoff,'' the expiring collective-bargaining agreement between the parties included a provision for deduction of union dues by checkoff. During the initial meeting of May 13, Respondent proposed that the dues-checkoff provision be discontinued. At the second meeting, held on May 24, Respondent explained its position ''that the collection of dues should be an issue between the Union and the employees and that it did not want to be in the collection business. However, Respondent advised that it was willing to discuss the issue of the dues checkoff further.''

During the next meeting, held June 2, McFall explained the Respondent's position regarding the dues checkoff to Jim Tudor, the union spokesman. McFall testified that, as with the previous contract negotiations in 1989, the Respondent ''was fundamentally opposed to the checkoff.'' Among the problems cited were that the Company had managers who had no experience with such a clause and did not want it, that the Union promised it would police the execution of the clause to avoid problems and did not, and that the Company did not want to know the identity of union employees in order to avoid discrimination suits.

At the next meeting, held June 6, the day the contract expired, the Union held firm on the demand for a dues-checkoff provision and requested that if there were any administrative problems, they would like an explanation. At the end of the meeting, the Union requested a contract extension and the Respondent responded that, per the March 10 letter from Suzie Adams and the terms of the contract itself, the contract terminated at midnight and that the Company would not continue to observe the dues checkoff at that time.

At the sixth meeting, held June 17, the Union again requested that Respondent explain any administrative problems with the dues-checkoff provision and its basis for opposition. The Union stated that dues checkoff was an issue of respect and that Respondent's position was a sign of disrespect and that it was a major impairment to the contract negotiations. Respondent disagreed, saying it was not simply an adminis-

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the 3 years contemplated for the new collective-bargaining agreement.

trative problem and that it did not see the dues checkoff as an issue of respect. Respondent felt that entering into a collective-bargaining agreement was a sign of respect to the Union, and that their respect for the Union was shown by the Company's willingness to have discussions with union stewards. Respondent also stated that the Company was ''fundamentally opposed'' to such a clause, and that the ''company did not want to be in the dues collection business.'' Respondent also noted that this was the same position it took in 1989.

At this same meeting, Van Os stated that ''if the Respondent was truly concerned about friction at the plant regarding Union dues, checkoff would minimize the opportunity for coercion or misunderstandings.'' After caucusing briefly to discuss the ''friction'' issue, Respondent concluded that the Union's concern was not persuasive and stated its reasons for opposition to participation in the dues checkoff:

> (1) The Respondent was being blamed by Union membership for problems caused.
>
> (2) The Respondent did not want to know the identity of Union members in order to prevent discrimination suits.
>
> (3) The collection of dues was an issue between the Union and its members.

D. *Analysis and Conclusions*

The primary issue to be answered is whether the negotiations between the parties had reached a valid impasse and, if so, whether Respondent was justified in implementing the unilateral changes.

In the leading case discussing impasse, *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board stated:

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse . . . an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.

At least on the issue of wages, there is no question as to whether Respondent made unilateral changes. I find from the undisputed evidence that it did.

Thus, the critical question is whether the parties reached a genuine impasse.

A genuine impasse in negotiations is synonymous with deadlock. Where there is a genuine impasse the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. *Hi-Way Billboards*, 206 NLRB 22, 23 (1973).[4] ''The Board does not lightly find an impasse. It requires 'that the parties have reached that point . . . in negotiations when the parties are warranted in assuming that further bargaining would be futile.' Futility is what must appear, not some lesser level of frustration, discouragement or apparent gamesmanship.'' *Powell Electrical Mfg. Co.*, 287 NLRB 969, 973 (1987). An impasse is reached ''after good-faith negotiations have exhausted the prospects of concluding an agreement'' and there is no realistic possibility that continuation of discussion at that time would be fruitful. *Television Artists AFTRA*, supra at 624, 628.

In *Taft Broadcasting Co.*, supra, the Board looked to the following ''relevant factors'' when considering whether an impasse exists:

> 1. The bargaining history.
> 2. The good faith of the parties in negotiations.
> 3. The length of the negotiations.
> 4. The importance of the issue or issues as to which there is a disagreement.
> 5. [and] the contemporaneous understanding of the parties as to the state of negotiations . . . . [*Taft* at 478.]

The burden of proving that an impasse exists is on the party asserting the impasse. *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992).

Applying these factors to the facts stated above, my view is that the parties did not reach impasse. Additionally, the recent Board finding, cited above, that Respondent had engaged in violations of Section 8(a)(1) and (5), makes Respondent's declaration of impasse seem suspicious and contrived.

In explanation, I turn to those factors, among those listed above, which I find dispositive here.

In the instant case, the parties' bargaining history is tainted. In December 1994, the Board held that Respondent refused to supply the bargaining representative with relevant information and also refused to bargain in good faith pursuant to the terms of a midterm wage reopener. The timing of this decision coincided with the expiration of the then existing contract, which ran from June 7, 1989, to June 6, 1994. The order from the Board required Respondent to bargain in good faith over the wage reopener. At the outset of negotiations, Respondent stated that it was willing to negotiate items ''including but not limited to those covering the period from June 7, 1992.''

Thus, in order for Respondent to remedy the prior unfair labor practice charge, it needed to bargain in good faith over the 1992 wage reopener during these discussions.

Accordingly, this requirement was also essential to declaring a valid impasse. The Board has made it clear that ''a finding of impasse presupposes that the parties prior to the impasse have acted in good faith.'' *Circuit-Wise, Inc.*, 309 NLRB 905, 918 (1992). ''Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices.'' Id. at 918. An impasse is invalid if it is partially based on the declarant's unremedied unfair labor practices. *Laborers Funds of Northern California*, 302 NLRB 1031, 1033 (1991). ''A party cannot parlay an impasse resulting

[4] It has been stated that an impasse cannot exist concerning only one issue. Cf. *Buck Creek Coal*, 310 NLRB 1240 (1993). But, the Board has long distinguished between an impasse on a single issue (that would not ordinarily suspend the duty to bargain on other issues) and the situation in which impasse on a single, critical issue brings about a breakdown in the entire negotiations. And, it is only in this latter context, when there has been a breakdown in the entire negotiations, that an employer is free to implement its last, best, and final offer.'' *Sacramento Union*, 291 NLRB 552, 554 (1988), enfd. 888 F.2d 1394 (9th Cir. 1989).

from its own misconduct into a license to make unilateral changes.'' *Wayne's Dairy*, 223 NLRB 260 (1976).

In the present case, the Union's members had not received a wage increase in 3 years, which is at least partially attributable to Respondent's failure to negotiate over this topic. This tainted history created the negotiating atmosphere which I find to have been genuinely hostile, and was partially responsible for the gap between the parties over wages. The wage demands by the Union were in part driven by a belief that it had to make up for ''lost ground,'' due to the salary freeze since 1992. And, of course, the long salary freeze was caused in substantial part by Respondent's engagement in illegal activities.

Moreover, even though the Union ''prevailed'' in the ensuing litigation, such tactics by management tend to damage the credibility of the Union among its membership, and thus weaken its bargaining position, especially when, as here, Respondent later presents itself, rather than the Union, as the champion of employees' rights to a higher wage rate.

To allow Respondent to take advantage of this tainted bargaining environment, which it created by prematurely declaring impasse, would go against the spirit of the Board's holdings in *Wayne's Dairy* and its progeny. Thus, these holdings dictate that Respondent's conduct during negotiations be held to a higher than normal standard due to the bargaining history of the parties.

As stated above, in order for Respondent to validly claim impasse, it must have bargained in good faith. As defined in *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960), ''[C]ollective bargaining is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.'' Furthermore, ''the Board has repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining.'' Id. at 485. A party must ''bargain with a sincere desire to adjust its differences . . . in order to reach an acceptable common ground for agreement.'' *U.S. Gypsum Co.*, 200 NLRB 1098, 1101 (1972), enf. denied 484 F.2d 108 (8th Cir. 1973).

However, under Section 8(d) the obligation to bargain collectively ''does not compel either party to agree to a proposal or require the making of a concession.'' If a term ''is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produces a stalemate.'' *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). ''But this statutory right to refuse to agree to a particular proposal or to make a concession, may not be used 'as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail.''' *H. K. Porter Co.*, 153 NLRB 1370, 1372 (1965). ''Bad faith is prohibited though done with sophistication and finesse. . . . [Good-faith bargaining] takes more than mere 'surface bargaining' or 'shadow boxing to a draw.''' Id. at 232. ''It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith.'' *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

Finally, while Respondent's understanding that the parties were at impasse was clearly voiced by Respondent, it is equally clear that the Union did not share that viewpoint. Based on the fact that a number of agreements had been reached by the parties, and the further fact that even on the wage issue I have found no impasse to have existed, I find that the contemporaneous understanding of the state of negotiations by the parties fails to support Respondent's position that there was an impasse.

Thus, looking at the overall facts in the present case, it appears to me that Respondent's declaration of impasse and subsequent implementation of a wage increase was hurried and premature, and was, thus, indicative of bad-faith bargaining. The negotiations between the parties had not in my opinion reached that point of ''deadlock'' or ''futility'' that the Board requires before declaring impasse. On the critical issue of wages, positive progress was being made. The parties started out 20 cents per hour apart in the first year and 40 cents per hour apart in the second and third years. Arguably, by the June 21 meeting, this gap had been closed to 10 cents per hour in the first year and 10 cents per hour for each of the next 2 years.

The introduction of the cost of dental insurance into the wage mix midway through the negotiations doubtless added an extra element which complicated these discussions.

At the June 17 meeting, Respondent reasonably demanded that any dental cost be included within the hourly wage increase. At this same meeting, Respondent also stated that it would not agree to a wage increase of 50/40/40 plus dental and that any dental coverage had to be mandatory. After this request, the Union proposed a 50/35/35 increase plus optional dental coverage which, when combined with Respondent's cost estimate for dental insurance, called for an actual increase of .585/.435/.435.

Respondent asserts that the Union's June 21 wage proposal was an increase over its previous wage demand of 50/40/40 plus dental, which comes to a total increase of .585/.485/485. However, the Union's June 21 request of 50/35/35 plus dental is actually a combined increase of .585/.435/.435. Thus, in the first year their wage demand did not increase while in the second and third year, the Union's demand actually decreased by 5 cents from its June 17 proposal. Therefore, some progress on wages was still being made. These figures do not support Respondent's assertion that the June 21 union proposal was an increase.

As indicated, the parties' wage proposals were moving slowly, but steadily closer. The June 21 proposal by the Union was their first which included Respondent's dental cost estimates. Respondent wrongly rejected this proposal as an increase and used it as a means to implement unilateral changes without making a counteroffer or requesting an additional proposal. Such conduct neither ''reflect[s] a desire to reach ultimate agreement, to enter into a collective bargaining contract'' nor ''the serious intent to adjust differences and to reach an acceptable common ground.'' *Insurance Agents' Union*, 361 U.S. at 485 (1960); *U.S. Gypsum Co.*, supra. Nor can it be reasonably said that at this point ''there was a complete breakdown in the entire negotiations, '' allowing the employer to implement its last, best, and final offer. See footnote 2, supra, citing *Sacramento Union*, 291 NLRB 552, 554 fn. 2 (1988).

The conduct of Respondent shows a lack of good-faith bargaining and does not comport with the standards the Board requires of an employer declaring impasse. The facts show that the declaration of impasse was premature since negotiations were still making progress. Furthermore, since Re-

spondent prematurely cut off negotiations, it did not comply with the Board's order to bargain in good faith over the 1992 wage reopener. Thus, ''a lawful impasse [could] not be reached in the presence of [this] unremedied unfair labor practice[ ].'' *Circuit-Wise Inc.*, 309 NLRB at 918.

Respondent's fall-back argument also fails. It argues that the implementation of the wage increase was lawful even in the absence of impasse ''because Respondent notified the Union that it intended to institute the change and gave the Union the opportunity to respond to that notice'' and that the Union failed to request to bargain in a timely manner. Respondent specifically cites *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5th Cir. 1992); and *Nabors Trailers v. NLRB*, 910 F.2d 268 (5th Cir. 1990), cert. granted 500 U.S. 903 (1991), cert. dismissed pursuant to Rule 46, 501 U.S. 1266 (1992); both citing *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964), where the court stated:

> It is true of course . . . that an employer may make changes without the approval of the Union as the bargaining agent. The Union has no absolute veto power under the Act. Nor do negotiations necessarily have to exhaust themselves to the point of so-called impasse. But there must be a discussion prior to the time the change is initiated. An employer must at least inform the Union of its proposed actions *under circumstances which afford a reasonable opportunity for counter arguments or proposals*. [Emphasis added.]

Respondent's line of authority is misapplied to the facts of the present case because, here, Respondent declared impasse. Under *Citizen's Hotel* and its progeny, ''impasse and the *Citizen's Hotel* standards are distinct exceptions to the general rule that an employer's unilateral change in the terms and conditions of employment constitutes an unfair labor practice.'' *Nabors Trailers v. NLRB*, 910 F.2d at 275. Respondent here declared impasse stating that its offer was final and further bargaining would be futile.

It seems unreasonable to expect a union to continue negotiating after such a position has been taken. The union was not so much presented with an opportunity to bargain about the wage increase as it was afforded a chance to give approval to the Respondent's decision to grant it. Furthermore, as the Board has stated, impasse and the *Citizen's Hotel* standard are distinct concepts. Therefore, Respondent cannot attempt to use one, and on failing, fall back on the other. Here, Respondent declared impasse and implemented its ''final'' offer. It was not interested in further bargaining from the Union beyond having the Union accept its proposals.

Finally, the Respondent ignores the Board's holding in *Bottom Line Enterprises*, 302 NLRB 373 (1991), concerning an employer's duty to refrain from implementing unilateral changes during contract negotiations.

> Where as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain. [I]t encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. [Id. at 374.]

The Board has recognized but two exceptions to this general rule.

The first occurs ''when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining.'' Id. at 374. There is no evidence in the record showing that the Union intentionally engaged in dilatory tactics. Moreover, Respondent did not make ''diligent and earnest efforts in bargaining.

The second exception occurs ''when economic exigencies compel prompt action.'' Id. at 374. Here, Respondent argues that it needed to unilaterally implement the wage increase because the employees had not had a raise in 3 years. Yet, it was Respondent's own bad-faith failure to negotiate over the midterm wage reopener that caused this predicament. Therefore, this claim fails under *Wayne's Dairy*, 223 NLRB 260 (1976).

Thus, Respondent cannot claim that either exception excuses its actions.

Accordingly, I conclude that Respondent's refusal to bargain, based on its having prematurely declared impasse and unilaterally implemented the wage increase, violated Section 8(a)(1) and (5) and Section 8(d) of the Act.

Nevertheless, I go on to discuss Respondent's ''Announcement'' of its final offer; which stated ''in addition [to the wage increase], next year we intend to add dental coverage.''

Yet, the dental plan was to have been one part of a 3-year economic package, which included wage increases in each of the 3 years and dental insurance beginning in the third year. Two weeks later on July 4, Respondent implemented the first component of the economic package, the wage increase. Here, it appears that Respondent could have rescinded its promise to implement the dental plan in the absence of a contract. However, such speculative is pointless. Based on Respondent's implementation of the first year wage increase, there was no reason to assume that the later components of the economic plan would not be implemented. Although, Respondent's employees did not incur any immediate benefit from the promise of implementation of a dental plan in the second year, such a promise of benefit by an employer bypasses the Union and thus immediately affects it detrimentally.

Regarding the issue of the dues checkoff, the question is whether the Respondent refused to bargain collectively over the subject of the dues checkoff in violation of Section 8(a)(1) and (5) of the Act. A union-dues checkoff is a mandatory subject of bargaining. *NLRB v. J. P. Stevens & Co.* 538 F.2d 1152, 1165 (4th Cir. 1976). While an employer does not have to agree to include such a provision, it is required to bargain in good faith over the term. Id. at 1165. In order to satisfy the good-faith requirement, any opposition to such a provision ''must reflect a legitimate business purpose.'' Id. at 1165.

In the present case, the Respondent offered two legitimate business purposes as to why they were opposed to the dues-checkoff provision. First, the Respondent was being blamed by the Union and its membership for problems caused by the checkoff. Second, the Respondent did not want to know the identity of union members to prevent discrimination suits. In addition to these reasons, the Respondent stated ''we are fundamentally opposed to [a dues-checkoff provision]'' and that

''the company did not want to be in the dues collection business.''

For the purposes of this opinion, I accept arguendo the first two reasons provided by the Respondent as legitimate business reasons.

However, the Company's fundamental opposition to a dues checkoff and its desire not to ''be in the dues collection business'' are not viewed by me as legitimate business purposes. The Board has held that ''A 'philosophical opposition' to [a dues] checkoff, a union-security device, may constitute evidence of bad faith bargaining.'' *Langston Cos.*, 304 NLRB 1022, 1050 (1991), citing *Tiffany & Co.*, 268 NLRB 647, 650 (1984).

Here, the Respondent's attorney and chief negotiator, John McFall, never explained what he actually meant by ''fundamental.'' While Webster's gives many definitions for the word ''fundamental,'' the definition closest to the context of the word used here is ''belonging to one's innate or ingrained characteristics, deep rooted.'' *Webster's Third International Dictionary*, 921 (G&C Merriam Co. 1963). While not exactly synonymous with ''philosophical,'' such a ''deep rooted'' opposition is still indicative of a prior fixed and firm intent, and, thus, of bad-faith bargaining. For a party ''to engage in negotiations with a fixed, preconceived, and unshakable intention of refusing to bargain about a subject relating to wages, hours, or any other term or condition of employment is to reject, to that extent, the principle of collective bargaining as prescribed by the Act.'' *Preterm, Inc.*, 240 NLRB 654, 673 (1979).

Similarly, the statement ''that the company did not want to be in the dues collection business'' is not a legitimate business purpose. Checking off union dues generally imposes no burden on an employer. *H. K. Porter Co.*, supra.

Respondent cannot have failed to have been fully aware that the Union, like others similarly situated, perceived checkoff as an issue of ''respect.'' For, if it somehow failed to grasp that concept on its own, the Union's attorney specifically told it that the Union felt that way on the issue. By removing checkoff from the collective-bargaining agreement, Respondent would effectively cause the Union to lose respect and prestige among its membership. The Respondent was similarly aware of the Union's claim that in-person collection by union stewards would probably cause friction within the plant between union officials and its membership. Despite these considerations, the Respondent remained inflexible on the issue.

''From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.'' *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Given the totality of the circumstances, the Respondent's actions with regard to the dues-checkoff provision once again show bad-faith bargaining versus hard bargaining. An employer with ''clean hands'' could bargain to impasse over a checkoff provision provided legitimate business reasons are provided. *J. P. Stevens & Co.*, 538 F.2d at 1165. Here, the Respondent does not have clean hands, and its opposition to the dues checkoff seems to be an attempt to frustrate the bargaining process and weaken the Union in the eyes of its membership.

Here, the Respondent offered legitimate business reasons for continuing the checkoff; however, these reasons appear suspect when balanced against their total conduct. First the Respondent freely admits that they were ''fundamentally'' opposed to a dues checkoff. Because of this fundamental opposition, any efforts by the Union to assist with any administrative problems were dismissed without any real consideration. Also, the Respondent was unsympathetic to the Union's claims that this was an issue of respect between the Union and its membership and that the collection of dues by a union steward would cause friction at the plant. Finally, there is the issue of the Respondent's bargaining history. In addition to the 1992 violations, the Respondent also engaged in bad-faith tactics during these negotiations by declaring a premature impasse and implementing unilateral changes. These repeated violations demonstrate an antiunion animus.

Once again, it appears that the Respondent's conduct in its totality neither ''reflect[s] a desire to reach ultimate agreement, to enter into a collective bargaining contract'' nor ''the serious intent to adjust differences and to reach an acceptable common ground.'' *Insurance Agents' Union*, supra, 361 U.S. at 485; *U.S. Gypsum Co.*, supra, 200 NLRB at 1101. Rather, it appears that the Respondent's primary goal was to reach impasse, and an unwavering stance on a prestige issue such as a dues-checkoff provision is further evidence of that goal. Accordingly, I conclude that the Respondent did not bargain in good faith over the union-dues checkoff provision in violation of Section 8(a)(5) and Section 8(d) of the Act.

Accordingly, I conclude that Respondent's overall conduct was indicative of a general refusal to bargain, and, further, based on its having prematurely declared impasse and unilaterally implemented the dental plan, also violated Section 8(a)(1) and (5) and Section 8(d) of the Act.

REMEDY

Having found Respondent to have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall affirmatively be required to bargain in good faith with the Union over the terms of a new collective-bargaining agreement and, in addition, shall be required to bargain over the terms of a retroactive, midterm wage reopener as set forth in the previous collective-bargaining agreement.

Respondent shall also be required to revoke all the unilateral changes in wages and the dental plan unlawfully instituted by it on July 4, 1994.

However, with regard to the unilateral change involving wages, since this change involved the granting of a benefit, this Order will require rescission of the beneficial change only if the Union seeks such rescission. See *Great Western Broadcasting Corp.*, 139 NLRB 93, 96 (1962).

As for the dental plan, since Respondent has never implemented the plan as promised, and it is not bound to in the absence of a contract, no affirmative action needs to be taken.

Summarizing, I find and conclude that counsel for the General Counsel has proven each of the allegations of violations of Section 8(a)(5) and (1) of the Act made and contained in the complaint, as amended, against Respondent, and

I shall order an appropriate remedy for all such illegal actions.

CONCLUSIONS OF LAW

1. The Respondent, CJC Holdings, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 1751, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about June 21, 1994, Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union by declaring that negotiations were at an impasse and implementing it's last offer relating to wages and dental insurance, and by inflexibly insisting on deleting provision for checkoff from its agreement with the Union without valid business justification.

4. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED:
>
> All production and maintenance employees employed by CJC Holdings, Inc. at its Austin, Texas facility, formerly operated by Artcarved Class Rings as successor to John Roberts, Incorporated,
>
> EXCLUDED:
>
> All other employees including office and factory clerical employees, inventory purchasing clerks, security guards, nurses, professional and technical employees, employees involved in new product design and development and supervisors as defined in the Labor Management Relations Act of 1947, as amended, as certified by the National Labor Relations Board in Case No. 23–RC–3979 on August 13, 1973.

5. The above unfair labor practices have an effect on commerce as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, CJC Holdings, Inc., Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with the Union, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751, as the exclusive bargaining representative of its employees in the appropriate bargaining unit set forth below, by implementing the terms of its last offer to the Union without first having bargained in good faith to a lawful impasse, or by insisting upon deleting provision for checkoff from any contract which may be agreed on without valid business justification.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[6]

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751, as the exclusive collective-bargaining representative of the employees in the unit specified above and, if requested by the Union, rescind the changes in wages, hours, and working conditions implemented on or about June 21, 1994.

(b) Post at its office and facility in Austin, Texas, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] All outstanding motions, if any, inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] I provide for a broad remedy here due to the repeat nature of Respondent's offenses.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751, in the following unit which is appropriate for the purposes of collective bargaining:

> INCLUDED:
>
> All production and maintenance employees employed by CJC Holdings, Inc. at its Austin, Texas facility, for-

merly operated by Artcarved Class Rings as successor to John Roberts, Incorporated.

EXCLUDED:

All other employees including office and factory clerical employees, inventory purchasing clerks, security guards, nurses, professional and technical employees, employees involved in new product design and development and supervisors as defined in the Labor Management Relations Act of 1947, as amended, as certified by the National Labor Relations Board in Case No. 23–RC–3979 on August 13, 1973.

WE WILL NOT fail or refuse to bargain collectively in good faith with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751, by unilaterally implementing the terms of our last offer to the above-named labor organization when there has been no lawful impasse in negotiations, or by insisting on an agreement without provision for dues checkoff without valid business justification.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively in good faith with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 1751, as the exclusive collective-bargaining representative of our employees in the unit described above with respect to the wages, hours, and working conditions of all the employees in the above-described unit and, if requested by the above named labor organization, we will rescind the unilateral changes we implemented on June 21, 1994.

CJC HOLDINGS, INC.